

against individual Native Americans, but on the unique federal restraints in place today on tribal entities and the use of their assets.

Only by maintaining its Tribal Affiliation Rule can the Commission ensure that applicants controlled by Indian Tribes and Native Corporations will have full and equal opportunity to participate in spectrum-based services. This rule does not give Tribal entities advantages not enjoyed by others similarly situated. It does not exclude anyone from participating in the auction, nor does it treat anyone inequitably.

It is well established that "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."⁵⁸ Such an analysis must, of course, be based on a record fully-developed after notice of the proposal and an opportunity to comment on the rescission.⁵⁹

CIRI submits that no such record has been or could be developed. The essential circumstances justifying the Tribal Affiliation Rule simply have not changed. Congressional power to deal with the Indian Tribes remains in place. Express congressional policy supporting the rule remains in place. The ANCSA provisions creating CIRI and the other Native Corporations and their unique financial structure remain in place.

⁵⁸. Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 42 (1983).

⁵⁹. Id.

Indeed, the Commission has not linked the Tribal Affiliation Rule to the minority preferences the Commission now proposes to eliminate. Given their independent congressional and constitutional foundation, these rules cannot be linked. The fact that the Commission's minority preferences may be eliminated in the wake of Adarand provides no justification for a failure to continue to acknowledge the unique financial attributes of Tribal entities.

III. THE COMMISSION SHOULD ADOPT MEASURES THAT WILL YIELD THE EARLIEST POSSIBLE AUCTION DATE

CIRI supports the Commission's proposal to limit preferences within the entrepreneurs' block rules for Block C to small businesses. As noted below and in the Further NPRM, the Adarand decision applies strict scrutiny to preferences based on race, not on size. Although eliminating the entrepreneurs' block preferences granted on the basis of race or gender will affect the business plans of some designated entities, the vast majority of bidders owned by members of minority groups or women will likely qualify as small businesses under the proposed C Block rules.⁶⁰

Many of those bidders have already established business relationships in anticipation of the C Block auction. Those relationships frequently require several months to organize and, in most cases, are based on economic assumptions flowing from the Commission's existing entrepreneurs block rules. Thus, the

^{60.} Further NPRM at ¶ 12.

Commission is correct in noting that these relationships are likely to survive if the C Block auction is not significantly delayed, and the Commission imposes minimal changes on the economic assumptions upon which many business plans are predicated.⁶¹

For these reasons, CIRI supports the Commission's proposals to extend the 49.9 percent equity exception to all entrepreneurs,⁶² to offer to small businesses the most favorable payment terms now available,⁶³ and to increase the bidding credit available to small businesses from 10 to 25 percent.⁶⁴ With these improvements, most small businesses will be able to avoid the costly and time-consuming process of renegotiating existing business arrangements. Pending and consummated alliances will remain intact, and the Commission will effectively encourage the participation of a broad cross-section of potential bidders without implicating the Supreme Court's decision in Adarand.

^{61.} Id. at ¶ 10.

^{62.} Id. at ¶ 15.

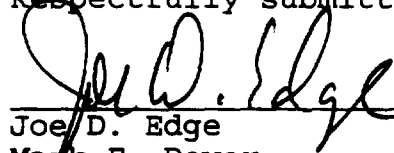
^{63.} Id. at ¶ 24.

^{64.} Id. at ¶ 27.

IV. CONCLUSION

For these reasons, CIRI urges the Commission to adopt measures that will yield the earliest possible C Block auction date and to maintain its Tribal Affiliation Rule.

Respectfully submitted,



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